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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JUAN ROMERO, FRANK TISCARENO,  
12 and KENNETH ELLIOTT, on behalf of  
13 themselves and all others similarly  
situated,

14 Plaintiffs,

15 v.

16 SECURUS TECHNOLOGIES, INC.,

17 Defendant.  
18

Case No.: 16cv1283 JM (MDD)

**ORDER DENYING DEFENDANT'S  
MOTION FOR RELIEF FROM NON-  
DISPOSITIVE PRETRIAL ORDER  
OF MAGISTRATE JUDGE**

19 Defendant Securus Technologies, Inc. ("Defendant") moves the court for relief from  
20 a non-dispositive pretrial order issued by Magistrate Judge Mitchell D. Dembin. (Doc. No.  
21 70.) Specifically, Defendant asks the court to modify Magistrate Judge Dembin's October  
22 16, 2017 Order on Joint Motion for Determination of Discovery Dispute Regarding  
23 Defendant's Responses to Written Discovery ("Magistrate Judge's Order"), (Doc. No. 66),  
24 to require the parties to negotiate in good faith to finalize the terms of an agreed protective  
25 order and, if no agreement is reached by a date certain, to submit competing protective  
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orders to the court.<sup>1</sup> Plaintiffs Juan Romero, Frank Tiscareno, and Kenneth Elliott (collectively, “Plaintiffs”) oppose the motion. (Doc. No. 81.) The court finds the matter appropriate for decision without oral argument pursuant to Local Rule 7.1(d)(1) and, for the following reasons, denies the motion.

### **BACKGROUND**

Plaintiffs are two former inmates and a criminal defense attorney, all of whom used Defendant’s telephone systems to make calls to and from certain correctional facilities in California. Plaintiffs have moved the court to represent a class of individuals whose attorney-client conversations to or from a number “designated or requested not to be recorded” were eavesdropped on or recorded during the class period. (Doc. No. 62-1 at 1.)

On September 22, 2017, the parties submitted a joint motion for determination of a discovery dispute to Magistrate Judge Dembin. (Doc. No. 59.) The motion presented Plaintiffs’ motion to compel additional responses from Defendant to certain interrogatories, requests for production, and requests for admission. Defendant opposed the motion, in pertinent part because of the lack of a protective order. The parties had been operating under the shared assumption that a protective order had already been executed. However, when preparing its discovery responses, Defendant learned that a protective order was never finalized, filed, or entered. In the absence of a protective order, Defendant refused to produce documents in response to Plaintiffs’ discovery requests.

When the parties were unable to agree on the terms of a protective order, Plaintiffs informed Defendant that they would file the motion to compel. At no point did Defendant move for a protective order. Instead, in its opposition to Plaintiffs’ motion to compel,

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<sup>1</sup> In its reply brief, Defendant asks the court for the first time to modify the Magistrate Judge’s Order “to enter the version proposed by Plaintiffs,” apparently referring to a version of a protective order previously offered by Plaintiffs. (Doc. No. 82 at 3:20–23.) Defendant did not request such relief in its original motion. Under the court’s chamber’s rules, matters “raised by a party for the first time in their reply brief, unless directly in response to the opposition, may not be considered.” Accordingly, the court will not consider this newly requested form of relief.

1 Defendant “respectfully suggest[ed] that the Court direct the parties to negotiate in good  
2 faith to finalize the terms of an agreed protective order, and if no agreement may be reached  
3 by a date certain, to submit competing protective orders with redlines showing their  
4 differences.”

5 On October 16, 2017, Magistrate Judge Dembin granted in part and denied in part  
6 Plaintiffs’ motion to compel. (Doc. No. 66.) Magistrate Judge Dembin determined that  
7 Defendant’s refusal to produce documents in response to certain interrogatories and  
8 requests for production because of the lack of protective order was “just plain wrong.”  
9 (Doc. No. 66 at 4.) As Magistrate Judge Dembin explained,

10 Following the failed attempt to achieve agreement on the terms of protective  
11 order, Defendant had two options: Produce the requested documents or move  
12 the Court for a protective order under Rule 26(c), Fed. R. Civ. P. It was not  
13 an option for Defendant to simply withhold production. Rule 26(c)(1)  
14 provides that following a failed attempt to reach agreement, “the party from  
15 whom discovery is sought may move for a protective order....” Defendant  
16 has had ample opportunity to move for a protective order. Defendant’s failure  
17 to do so is inexplicable.

18 (Id.) Because Defendant had not produced the requested documents nor moved for a  
19 protective order, Magistrate Judge Dembin granted Plaintiffs’ motion to compel certain  
20 interrogatories and requests for production.

21 On October 30, 2017, Defendant filed the instant motion seeking to modify the  
22 Magistrate Judge’s Order. (Doc. No. 70.)

### 23 **LEGAL STANDARDS**

24 A non-dispositive pretrial order of a magistrate judge will be upheld unless it is  
25 “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A).  
26 As other district courts have described,

27 This Court’s function, on a motion for review of a magistrate judge’s  
28 discovery order, is not to decide what decision this Court would have reached

1 on its own, nor to determine what is the best possible result considering all  
2 available evidence. It is to decide whether the Magistrate Judge, based on the  
3 evidence and information before him, rendered a decision that was clearly  
4 erroneous or contrary to law.

5 Bare Escentuals Beauty, Inc. v. Costco Wholesale Corp., 2007 WL 4357672, at \*2 (S.D.  
6 Cal. Dec. 11, 2007) (quoting Paramount Pictures Corp. v. Replay TV, 2002 WL 32151632,  
7 at \*1 (C.D. Cal. May 30, 2002)).

8 Review under the clearly erroneous standard, which applies to “factual findings and  
9 discretionary decisions made in connection with non-dispositive pretrial discovery  
10 matters,” Guzman v. Bridgepoint Educ., Inc., 2014 WL 3407242, at \*4 (S.D. Cal. July 10,  
11 2014), is “significantly deferential, requiring a definite and firm conviction that a mistake  
12 has been committed.” Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers  
13 Pension Tr. for S. California, 508 U.S. 602, 623 (1993). The contrary to law standard  
14 “permits independent review of purely legal determinations by a magistrate judge.” Stoba  
15 v. Saveology.com, LLC, 2015 WL 5040024, at \*4 (S.D. Cal. Aug. 26, 2015).

## 16 DISCUSSION

17 Defendant does not cite to a single authority in the “Argument” section of its motion  
18 to support its position, nor does it address how the Magistrate Judge’s Order was clearly  
19 erroneous or contrary to law. (See Doc. No. 70 at 3–6.) Instead, Defendant merely  
20 reiterates how both parties mistakenly assumed that a protective order was already in place,  
21 but once Defendant informed Plaintiffs of the lack of protective order, the parties could not  
22 agree on the terms of a protective order. Defendant concludes that “Plaintiffs’ position [of  
23 not agreeing to proposed terms of a protective order] is nothing more than gamesmanship.”

24 After Plaintiffs point out that Defendant still has not moved for a protective order,  
25 Defendant argues in its reply that Magistrate Judge Dembin “improperly faulted  
26 [Defendant] for supposedly failing to seek a protective order,” arguing that it had done so  
27 in the joint motion. In the joint motion, Defendant “respectfully suggest[ed] that the Court  
28 direct the parties to negotiate in good faith to finalize the terms of an agreed protective

1 order, and if no agreement may be reached by a date certain, to submit competing protective  
2 orders with redlines showing their differences.” Magistrate Judge Dembin exercised his  
3 discretion when he declined to follow that suggestion. Given that Magistrate Judge  
4 Dembin’s chamber’s rules already require parties to participate meaningfully in meet and  
5 confer sessions over discovery disputes before moving the court for a protective order, it  
6 would have been redundant for him to make such an order. Therefore, the court finds that  
7 Magistrate Judge Dembin did not abuse his broad discretion and his decision was neither  
8 clearly erroneous nor contrary to law.

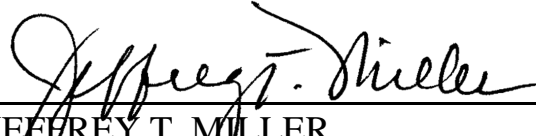
9 In sum, Defendant failed to provide the court with sufficient evidence or authority  
10 to give it a “definite and firm conviction that a mistake has been committed.” Concrete  
11 Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 U.S.  
12 602, 623 (1993). Consequently, the court will not modify the Magistrate Judge’s Order.

### 13 CONCLUSION

14 For the foregoing reasons, the court denies Defendant’s motion.

15 IT IS SO ORDERED.

16 DATED: January 5, 2018

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18 JEFFREY T. MILLER  
19 United States District Judge  
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